No. 17396

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARVEL H. COSPER AND STELLA COSPER,

Appellants,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Appellee

APPELLEE'S ANSWERING BRIEF

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INDEX

TABLE OF CASES
AND
AUTHORITIES CITED

AUTHORITIES

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FOREWORD

Counsel for Harvel H. Cosper and Stella Cosper, Appellants herein, and counsel for Southern Pacific Company, Appellee herein, have agreed, pursuant to Rule 76 of the Federal Rules of Civil Procedure, on a statement of this case which is found in Appellants' Opening Brief and the Transcript of Record. (TR. pp. 3 and 4)

This appeal results from the trial court giving the following instruction, which shall hereinafter be referred to as "Contested Instruction":

> "Well, let me say that if you found that the damage was caused by an act of God, and that it could not have been prevented by the compliance with the contract, then there would be — your verdict would have to be for the defendant. In other words, if the damage was caused by an act of God and it couldn't have been prevented if the defendant had carried out its contract, it would have happened anyway because of the forces of nature, then your verdict would be for the defendant, if that is what you found."

Appellee contends:

(a) That the "Contested Instruction" is an accurate statement of the law and is not in conflict with Modified Plaintiffs' Instruction No. 6. (TR. pp. 8 and 9)

(b) That on appeal, Appellants cannot assign as error the "Contested Instruction," since they failed to make a timely objection to it before the jury retired to deliberate its verdict.

ARGUMENT

(A)

If the Appellants are correct and the Restatement of Contracts, Section 328, cited by them is the general rule, we believe this case falls within the exception to the general rule.

The Appellants assume as a fact that the easements, dated June 6, 1935, and November 5, 1937, (TR. p. 5) imply that Appellee had a duty to maintain the dikes and ditches in question, whether or not it was physically possible to do so. We submit, this is not the law. In the case of *Faria v. Southwick,* 1959, 81 Idaho 68, 337 P. 2d 374, plaintiff and defendant entered into a contract with respect to a piece of land which both believed to be fertile and productive, when in fact that land was alkaline and unproductive. Citing a Maryland case, the Idaho Court stated the exception to the general rule:

> "'* * * Where parties enter into a contract upon the common assumption that a particular and essential state of things exists with reference to a substantial subject-matter, the nonexistence of that state of things, through default of neither party, ends the liability and prevents the accrual of a duty dependent upon it. * * *'
>
> "Restatement of Contracts, volume 2, p. 847, states that with certain exceptions not applicable here
>
> > "'* * * a promise imposes no duty if performance of the promise is impossible because of facts existing when the promise is made of which the promisor neither knows nor has reason to know.'"

We submit that, in applying reason to this case, the jury assumed that the original contracting parties did not foresee the possibility of an unprecedented storm. Furthermore, under the Court's instructions, which are not assigned as error, the jury found from the evidence that the unprecedented storm, being an act of God, was the sole cause of Appellants' injury. Since the sole cause of Appellants' injury was an act of God and not the result of any breach on the part of Appellee, Appellants cannot recover damages in any amount. *Reddick v. McAllister Lighterage Line, Inc.,* 1958, 258 F. 2d 297.

As an illustration of this point, we call the Court's attention to the case of *Barnard-Curtiss Company v. United States,* 1958, 257 F. 2d 565, decided by the U. S. Court of Appeals, 10th Circuit. In the *Barnard* case, the subcontractor contracted with the prime contractor to complete certain work by December, 1954. Work was continuing in May, 1955, when an unprecedented storm caused a flood which severely damaged the project structures. When the subcontractor sued, the prime contractor counter-claimed on the basis that the subcontractor failed to complete on time. The Court of Appeals held that:

> "The May 17-18 flood was an unprecedented and extraordinary occurrence of unusual proportions and could not reasonably have been foreseen by the parties. The trial court properly found that it was an 'Act of God.' No recovery may be had from the consequences of the action of natural causes in connection with a breach of contract unless such consequences can be said to have been within the contemplation of the parties at the time of the making of the contract as a probable result of the breach. The damages

arising from the flood did not arise in the usual course of things from the failure to complete on time and were not in the contemplation of the parties at the time they made their contract. As they were not foreseeable consequences of the breach, no recovery can be had on account of damages caused by the flood."

Whether the holding in the *Barnard* case is the exception to the rule or the modern general rule, the reasoning behind it is sound and just. Since the facts in the *Barnard* case and the instant case are parallel, we see no reason why the "Contested Instruction" should be found erroneous. Furthermore, we believe that the "Contested Instruction" is merely an elaboration of the Court's Instruction No. 5. (TR. p. 8)

(B)

In the case of *Bercut et al v. Park, Benziger & Co., Inc.,* 1945, F. 2d 731, it was contended that the Lower Court erred in failing to instruct the jury as a matter of law regarding an element of damages. This Court refused to consider the specification of error for several reasons, one of which was that "there was no timely request for an instruction of the character discussed nor timely objection to the Court's omission so to advise the jury." As authority for its holding, this Court cited Rule 51 of the Federal Rules of Civil Procedure, which reads as follows:

"Rule 51. Instructions to Jury: Objection

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth

in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. *No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.* Opportunity shall be given to make the objection out of the hearing of the jury." (Emphasis ours.)

The purpose of Rule 51 is to advise the trial judge as to a single and precise point in which he has erred in law so that he may reconsider his ruling and, if convinced of error, so instruct the jury prior to its deliberation. This Rule serves to prevent injustice and mistrial due to inadvertent errors. See *Howland et al v. Beck,* 1932, 56 F. 2d 35.

Although the Appellants contend that the "Contested Instruction" is incorrect, they raise no objection to the other instructions. It is a well settled rule that instructions must be construed together as a whole and, if and when so considered, they properly state the law, it is sufficient.

The Court should not, as stated, in *Louisville and Nashville Railroad Company v. Farmer,* 220 F. 2d 90, rehearing denied, 224 F. 2d 599, as grounds for reversal, lift "a single inconsistent and incorrect paragraph from the context of a well-rounded charge, correct when viewed in its entirety."

Since a reading of the instructions contained in the transcript indicates that the trial Court correctly charged the jury, a new trial should not be granted merely because a certain instruction, standing alone,

might possibly bear an interpretation which is prejudicial to the Appellee, when the other instructions and charge to the jury appear to be a fair statement of law. See *Gleeson v. Virginia Midland Railway Company,* 5 Mackey 356, 16 D. C. 356, reversed 1891, 11 S. Ct. 859, 140 U. S. 435, 35 L.Ed. 458.

In this case, as shown by the transcript, the Appellants failed to object to the Trial Court's giving the "Contested Instruction" before the jury retired. This Court and other Appellate Courts have stated repeatedly that a party cannot assign as error on appeal an instruction to which no objection was raised at the time of trial.

In the case of *O'Malley v. Cover,* 221 F. 2d 156, the Appellate Court pointed out that it has power to review *only* questions of law regarding instructions to the jury which are properly preserved for review and that it does not have the power to try or re-try cases.

In *United Verde Extension Mining Co. v. Koso,* 1921, 273 F. 369, where it was alleged that the trial court erred in its instructions, this Court held that no exception having been taken to the part of the charge covering the subject of damages, the defendant could not complain that it had been prejudiced.

CONCLUSION

Since the decided cases and Rule 51 of the Federal Rules of Civil Procedure provide that a party must object to the instructions prior to the jury's retiring, we urge that Appellants' failure to timely object, precludes the Appellants from assigning the giving of the "Contested Instruction" as error.

The judgment of the trial Court should be affirmed.

Respectfully submitted,
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Three copies of the within Appellee's Answering Brief received this _____ day of October, 1961.

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